

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Alison Moffat,

Complainant,

vs.

Hennepin County,

Respondent.

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-  
ORDER REGARDING COUNTY'S  
REQUEST FOR THE RELEASE OF  
PERFORMANCE EVALUATIONS

WHEREAS, Hennepin County has requested a court order authorizing the release of performance reviews conducted since 1993 by the County with respect to Becky Soukup, Karen Harris, Dominic Chlebeck, Janel Rinke, David Rice, Rita Furlong, Sharla Tolbert, and Duane Graves;

WHEREAS, the information contained in such personnel reviews is classified by the Minnesota Government Data Practices Act as private data on individuals;

WHEREAS, it is appropriate to require the County initially to attempt to contact each individual in order to obtain their consent to the release;

WHEREAS, in the event that an individual cannot be reached or fails to give consent, it is appropriate to provide the individual with formal notification of the requested release and provide the individual with an opportunity to file formal objections to the release;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The County shall attempt to contact each of the above-named individuals on Tuesday, June 11, 1996, or Wednesday, June 12, 1996, to determine whether the individual will consent to the release of the performance reviews.

2. In the event that one or more individuals consents to the release of performance reviews, copies of those performance reviews shall be immediately provided to counsel for the Complainant.

3. In the event that one or more of the above-named individuals cannot be reached or fails to give consent, the County shall deliver a copy of the Notification

attached hereto as Exhibit A to each individual's place of work or last known address by the end of the day on Wednesday, June 12, 1996.

4. After consideration of any objections received by June 17, 1996, the Administrative Law Judge will issue a determination concerning whether the requested personnel reviews shall be released pursuant to Minn. Stat. § 13.43, subd. 4 (1994). If the personnel reviews are ordered to be released, copies shall immediately be provided to counsel for the Complainant.

5. Any personnel reviews released by consent of the individual or order of the Administrative Law Judge shall be stamped "CONFIDENTIAL" and shall be subject to the terms of the December 1, 1995, Protective Order issued in this matter.

6. The provisions of the December 1, 1995, Protective Order are incorporated into this Order. All persons who gain access to the private data contained in the personnel reviews are required to conform to all terms and conditions of the Protective Order.

7. This Order is issued for the reasons discussed in the Memorandum below.

Dated this \_\_\_\_\_ day of June, 1996.

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BARBARA L. NEILSON  
Administrative Law Judge

#### MEMORANDUM

Present and former employees of Hennepin County have a privacy interest in their personnel files. See, e.g., Fraternal Order of Police, Lodge 5, v. Philadelphia, 812 F.2d 105, 113, 115 (3d Cir. 1987) (medical and financial information); In the Matter of Agerter, 353 N.W.2d 908, 914 (Minn. 1984) (informational privacy, including sexual activities). However, personnel files are discoverable in an appropriate case. See, e.g., Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980) (plaintiff alleging discrimination can discover personnel files of others promoted or hired instead); Dixon v. Sanderson, 728 S.W.2d 878 (Tex. Civ. App. 1987) (personnel files of persons promoted over plaintiff may be discovered); DeLoitte, Haskins & Sells v. Green, 370 S.E.2d 194 (Ga. App. 1988) (personnel files of negligent employees may be discovered); Willis v. Golden Rule Insurance Co., 56 Fair Empl. Prac. Cas. (BNA) 1451 (E.D. Tenn. 1991) (personnel files may be discovered in an age bias case). Information contained in the personnel files of public employees is (with certain exceptions that are not applicable here) classified by the Minnesota Government Data Practices Act as private data on individuals which may be released pursuant to a court order. Minn. Stat. § 13.43, subds. 3-4 (1994).

In determining whether personnel files or any specific information contained in them should be disclosed, it is generally held that a balancing approach must be used. The Government Data Practices Act indicates that, if data are determined to be discoverable, the Administrative Law Judge shall decide "whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data. In making the decision, the [Administrative Law Judge] shall consider whether notice to the subject of the data is warranted and, if warranted, what type of notice must be given." Minn. Stat. § 13.03, subd. 6 (1994) Accord Westinghouse, 638 F.2d at 110 (it is appropriate, in deciding whether "an intrusion into an individual's privacy is justified," to consider "the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access"); In the Matter of Agerter, 353 N.W.2d at 913 (an individual's protectible right of informational privacy depends on "a balancing of the competing interests of the individual in keeping his or her intimate affairs private and the government's interest in knowing what those affairs are when public concerns are involved"); Gunnufson vs. Onan, 450 N.W.2d 179, 181 (Minn. App. 1990) (in some cases a protective order will provide appropriate protection of the privacy interests of the individual while minimizing the risk to the employer).

The County has requested that the Administrative Law Judge release performance evaluations of eight individuals. The County indicates that two of these eight individuals no longer work for the County and their whereabouts are unknown. The County further states that it does not have time before the commencement of the hearing to contact all eight individuals. However, it is appropriate to require the County to seek consent and provide written notice to employees prior to the disclosure of information from their personnel files. Accordingly, the Order includes a requirement that the individuals be contacted to determine if they consent to the release of their personnel reviews and that those who do not consent receive formal notification of the proposed release of the records and an opportunity to object to the release. The County will be required to deliver the notification to the last-known address of each individual in question or, to the extent that the individual is still employed by the County, to give them such notification at their work location by the end of the day on Wednesday, June 12. An expedited period is established during which these individuals may notify the Administrative Law Judge of any objection they may have to the release of their personnel reviews.

After the June 17, 1996, deadline for the receipt of such objections, the Judge will (1) issue an order releasing any personnel reviews that have not been the subject of an objection and (2) conduct an in camera inspection of any personnel reviews that have been the subject of an objection and issue a ruling regarding whether the documents will be released. If the documents are released, counsel for the Complainant will be provided with copies of the personnel reviews and the County will be in a position to seek to introduce them as exhibits in connection with the presentation of its case-in-chief later in

the hearing. The Complainant shall, upon request, be afforded additional time during the hearing to prepare for cross-examination of witnesses concerning these documents or, if appropriate, shall be permitted to recall such witnesses for cross-examination after having had a sufficient opportunity to review the documents.

B.L.N.

### Notification of Proposed Release of Personnel Reviews

A discrimination charge has been filed against Hennepin County. As part of the lawsuit, attorneys representing the County are seeking access to the performance reviews contained in your Hennepin County personnel files that were issued between 1993 and the present. The County anticipates that it may seek to introduce these performance evaluations as exhibits at the hearing, in an attempt to demonstrate that you were better qualified for the job than the complaining party and that the tests used by the County to create rank order eligible lists are valid.

A Protective Order has been issued by the Administrative Law Judge in this case. The Protective Order requires that, if your performance reviews are provided to the complaining party's attorney, the attorney must protect the confidentiality of the information and cannot use the records for any purpose other than the trial in this case and any related appeals. Furthermore, all documents must be returned to Hennepin County after the lawsuit is resolved.

If you believe that your performance reviews are sensitive or should not be disclosed, you have the right to object to review of these materials by the attorney for the complaining party. To do so, you must send your written objection, specifying the nature of the material you do not wish disclosed and your reasons for nondisclosure, to:

Barbara L. Neilson  
Administrative Law Judge  
Office of Administrative Hearings  
100 Washington Square, Suite 1700  
Minneapolis, Minnesota 55401-2138

If you do not object in writing by sending your objection to the Administrative Law Judge at the address noted above so that it is **received by Monday, June 17, 1996**, it will be assumed that you have consented to the disclosure of your performance reviews to the complaining party's attorney and such reviews will be made available to that attorney, subject to the terms of the Protective Order discussed above.

Exhibit A

